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IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

HAZARDOUS WASTE TREATMENT COUNCIL,
Petitioner,

v.

ENVIRONMENTAL PROTECTION AGENCY,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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QUESTION PRESENTED FOR REVIEW

The Resource Conservation and Recovery Act of 1976 ("RCRA"), 42 U.S.C. §§ 6901 *et seq.*, is intended, among other things, to reduce the threat to the environment posed by hazardous wastes. In these cases, Petitioner Hazardous Waste Treatment Council, a national organization of firms in the business of treating hazardous wastes, sought review of certain Environmental Protection Agency ("EPA") rules on the ground, *inter alia*, that those rules were too lax and, therefore, inconsistent with the language and intent of RCRA.

In *Clarke v. Securities Industry Association*, 479 U.S. 388 (1987), this Court held that under the Administrative Procedure Act, a party who has Article III standing may obtain review to hold an agency to the requirements of a statute so long as his interests bear "a plausible relationship to the policies underlying" the statute in question. But detecting an "apparent anomaly" in business organizations seeking *stricter* environmental regulation, the Court of Appeals ordered the parties to address petitioner's standing under RCRA to take pro-environment positions, and ultimately held that petitioner was barred from pursuing pro-environment "competitor claims." The question presented by this petition is:

> Whether a trade association whose members provide the services needed to fulfill Congress' environmental objectives, who have invested in and developed the technology that Congress intended to promote as a necessary step toward achieving its environmental objectives, and whose businesses are directly injured by EPA's refusal properly to implement provisions of RCRA that create the market for their services, lacks standing to obtain judicial review of the inadequacy of EPA's implementing regulations because it is unable to show that Congress expressly intended to benefit such firms or that it is an "unusually suitable champion" of Congress' objectives.

PARTIES TO THE PROCEEDINGS BELOW

Pursuant to Rule 19.4 of the Rules of this Court, this petition seeks review of two judgments of the United States Court of Appeals for the District of Columbia Circuit. The United States Environmental Protection Agency was the sole designated respondent in all of the cases at issue in each judgment. In the case designated No. 86-1143 below, the Hazardous Waste Treatment Council was sole petitioner.* Edison Electric Institute, National Rural Electric Cooperative Association, American Public Power Association, and their individual utility members intervened in support of EPA. The Hazardous Waste Treatment Council was the petitioner in the cases designated Nos. 87-1548 and 88-1177, and Petro-Chem Processing, Inc. was the petitioner in No. 87-1487.** These latter three cases were consolidated by the Court of Appeals.

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* The Hazardous Waste Treatment Council is a national trade association of firms and individuals engaged in, *inter alia*, the high-technology treatment and recycling of hazardous wastes. Pursuant to this Court's Rule 28.1, the Treatment Council states that it is a nonprofit corporation with no parent or affiliate companies.

** Petro-Chem Processing, Inc. has informed counsel for petitioner that it will not participate in proceedings before this Court. A letter stating the same has been filed with the Clerk and served on all parties to the proceeding below in compliance with this Court's Rule 19.6. Therefore, the Treatment Council is the sole petitioner.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Petitioner Hazardous Waste Treatment Council prays that a writ of certiorari issue to review the judgments and opinions of the United States Court of Appeals for the District of Columbia Circuit dated October 7, 1988, and January 13, 1989.

OPINIONS BELOW

The opinion of the Court of Appeals dated October 7, 1988 is reported at 861 F.2d 277 and is set forth in the Appendix at 1a-27a. The opinion of the Court of Appeals dated January 13, 1989, not yet reported, is set forth in the Appendix at 30a-40a. Both opinions arose out of proceedings under the Administrative Procedure Act to review orders of the Environmental Protection Agency.[1]

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[1] In No. 86-1143, petitioner sought review of a final rule published at 50 Fed. Reg. 49,164 (1985) (codified at 40 C.F.R. Part 266). In Nos. 87-1487 and 87-1548, petitioners sought review of regulatory action published at 52 Fed. Reg. 34,779 (1987) (to be codified at 40 C.F.R. Part 270). In No. 88-1177, petitioner sought

JURISDICTION

Pursuant to Rule 19.4 of the Rules of this Court, this petition prays for issuance of the writ with respect to two related judgments of a single court, the United States Court of Appeals for the District of Columbia Circuit. The opinion and judgment in No. 86-1143 below was entered on October 7, 1988 and a timely petition for rehearing denied on December 20, 1988. App. 28a. The opinion and judgment in Nos. 87-1487, 87-1548, and 88-1177 below was entered on January 13, 1989. This petition is filed within 90 days of the denial of rehearing in the earlier case. The jurisdiction of this Court rests on 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Section 10 of the Administrative Procedure Act ("APA"), 5 U.S.C. § 702, provides that

> [a] person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof.

Section 7006(a)(1) of the Resource Conservation and Recovery Act ("RCRA"), 42 U.S.C. § 6976(a)(1), provides that

> [a]ny judicial review of final regulations promulgated pursuant to this chapter and the Administrator's denial of any petition for the promulgation, amendment, or repeal of any regulation under this chapter shall be in accordance with sections 701 through 706 of title 5 . . . .

STATEMENT OF THE CASE

In these cases, the court below established a new test of "prudential standing" to limit the ability of business firms suffering commercial injury to press for *stricter*

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review of portions of a final rule published at 52 Fed. Reg. 46,946 (1987) (to be codified at 40 C.F.R. Part 264).

enforcement of environmental laws. By denying a right of judicial review to firms with an immediate financial interest in developing the technology and treatment capacity that Congress recognized as a necessary step toward meeting its environmental objectives, the decision below creates a substantial obstacle to the implementation of environmental laws. Because of the importance of this case to the enforcement of those laws in particular, and the significance of the question whether the lower courts are free to create new barriers to limit review of administrative failures to implement statutory directives where review is sought by firms whose commercial interests are intertwined with Congress' statutory goals, the Treatment Council has petitioned for certiorari.

The Hazardous Waste Treatment Council

The Hazardous Waste Treatment Council is the largest association of hazardous waste treatment firms and manufacturers of treatment technology in the country. The Treatment Council represents over sixty companies with operations in forty-eight states. As recounted by the Court of Appeals, the Treatment Council's member companies

> provide treatment or disposal services employing both established and emerging technologies and methods for treatment and management: incineration and other thermal destruction, reclamation, biological and chemical treatment, land disposal after pre-treatment, and hazardous site cleanups.

App. 5a-6a. The Council's Articles of Incorporation declare that among its purposes is

> [t]o promote the protection of the environment through the adoption of environmentally sound procedures and methods of destroying and treating hazardous wastes and the proper management of residues of those treatment and destruction processes.

App. 6a.

The Treatment Council represents firms whose economic interests and future viability depend largely on the presence, not the absence, of appropriate regulations for protection of the environment—regulations which create the demand for their advanced waste treatment technology and services. Accordingly, the Treatment Council has a strong incentive to participate in the legislative process in support of pro-environment positions, to participate in EPA rulemaking, and, where necessary, to vindicate Congress' will through litigation if EPA fails properly to implement and enforce the requirements of RCRA.[2]

The Resource Conservation and Recovery Act of 1976

In the Resource Conservation and Recovery Act, Congress sought to provide a comprehensive regulatory program for the management and safe disposal of hazardous waste. In particular, the 1984 amendments to RCRA set forth restrictions on the management of hazardous waste, including detailed requirements for hazardous waste generators, transporters and owners and operators of treat-

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[2] For example, during the 1984 reauthorization to RCRA, the Treatment Council successfully advocated amendments to close a loophole in RCRA that allowed the burning of hazardous waste in industrial boilers and furnaces where energy recovery was involved —including specifically RCRA Section 3004(q)(2)(c), 42 U.S.C. § 6924(q)(2)(C), at issue in Nos. 87-1487 and 87-1548, which requires among other things that big city cement kilns may not burn fuel which contains hazardous waste unless such kilns fully comply with EPA's regulations for incinerators. *See, e.g., Solid Waste Disposal Act Amendments of 1983: Hearings on S. 757 Before the Subcomm. on Environmental Pollution of the Senate Environment and Public Works Comm.*, 98th Cong., 2d Sess. 187, 195 (1983); *Resource Conservation and Recovery Act Reauthorization: Hearings Before the Subcomm. on Commerce, Transportation, and Tourism of the House Energy and Commerce Comm.*, 97th Cong., 2d Sess. 505-530 (1982). In addition, the Treatment Council successfully testified in support of amendments creating land disposal restriction, of which the salt dome prohibitions (at issue in No. 88-1177) were a part. *See Senate Hearings, supra*, at 189-95.

ment, storage and disposal facilities. *See, e.g.*, 42 U.S.C. §§ 6921-24; 40 C.F.R. Parts 260-270. With the 1984 amendments to RCRA, Congress tried to promote environmentally sound waste management practices "by encouraging process substitution, materials recovery, properly conducted recycling and reuse, and treatment." 42 U.S.C. § 6902(a)(6).

The Conference Committee reports on the 1984 amendments, for example, made clear that as a means of achieving its ultimate goal of protecting the environment, Congress consciously sought to promote the use of the services and technology that Treatment Council members provide and to create industrial treatment capacity adequate to handle the Nation's hazardous wastes. Thus, the legislative history shows that "the Conferees intend . . . that advanced treatment, recycling, incineration and other hazardous waste control technologies should replace land disposal"—such as salt domes, underground mines, and caves. H.R. Rep. No. 1133, 98th Cong., 2nd Sess. 80 (1984), *reprinted in* 1984 U.S. Code Cong. & Admin. News 5649, 5651. Specifically, to promote investment in and expansion of capacity of the industry represented by the Treatment Council, Congress expected EPA *not* to create a climate where "the regulated community believes that . . . deadlines will normally be extended and that immediate investment in development of alternate capacity will be premature and economically non-productive." S. Rep. No. 284, 98th Cong., 1st Sess. 19 (1983). The Senate Environment and Public Works Committee stressed that "[g]iven consistent *regulatory and economic incentives*, adequate [treatment] capacity will be quickly developed," and that "[w]ith the elimination of cheap, unsafe . . . alternatives, *treatment capacity* and inexpensive 'milk-run' style collection services *will develop* to meet regional demands." *Id.* (emphasis added).

Thus, one of Congress' goals in enacting and amending RCRA was the rapid development of a hazardous

waste treatment industry with sufficient capacity to meet both present and future needs. Congress appreciated that in order to create a "new market and increased demand for new, safer treatment and disposal technologies," market incentives for the development of such technologies and industrial capacity would have to be strengthened.[3] Congress sought to encourage the development of that technology and capacity by ensuring a market for those services through strict and comprehensive regulation requiring proper treatment of hazardous waste.[4]

No. 86-1143

No. 86-1143 below was a petition for review of EPA rules for the burning of hazardous wastes, including used oil, as fuel. *See* 50 Fed. Reg. 49,164 (1985) (codified at 40 CFR pts. 261, 264-66, 271). The Court of Appeals summarized that the "gist of [the Treatment Council's] complaint here is that EPA's regulations are not comprehensive and strict enough to comply fully with the controlling statute, RCRA." App. 5a.

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[3] 130 Cong. Rec. S13818 (Oct. 5, 1984) (Statement of Sen. Chafee). As Senator Chafee explained:

> The problem presented by land disposal of hazardous wastes is a classic example of the inability of the free marketplace to provide for the public good . . . . We have the technology to reduce the quantity of hazardous waste disposed of on the land and to render the waste less harmful. What we do not have, and will not have as long as cheap land disposal options are available, is a viable market to support the development and expansion of new, safer treatment and disposal technologies.

Id.

[4] *See also* S. Rep. No. 284, 98th Cong., 1st Sess. 6 (1983) (capacity for "alternative technologies" can "be developed if a viable market can be assured"); H.R. Rep. No. 198, 98th Cong., 1st Sess. 32 (1983) ("prudent public policy" would "encourage the development of alternative treatment technology and capacity").

EPA did not initially challenge the Treatment Council's standing to raise these issues. Nonetheless, the Court of Appeals was struck by what it saw as "the apparent anomaly of regulated entities demanding stricter regulation," and *sua sponte* ordered the parties to brief the issue. App. 5a. What followed was an exchange of briefs and affidavits, including several affidavits submitted by the Council and its members describing the purpose of the organization and its members' interest in the implementation and enforcement of RCRA.

In approaching the standing issue, the Court of Appeals did not, and could not, dispute that "the asserted laxity of the regulations will diminish the market for [the Treatment Council's] high-tech control services," thereby causing economic injury.[5] App. 6a. Neither did it doubt that while the forms of hazardous waste disposal which Treatment Council members employ are heavily regulated under RCRA, the EPA regulations in question exempted other forms of disposal from the same sorts of regulations, affecting the ability of Treatment Council members to compete with those methods. The Court of Appeals panel referred to these types of claims as "competitor claims." [6] App. 6a.

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[5] The fact that petitioner has suffered Article III "injury-in-fact" was not questioned by the Court of Appeals. The question presented is whether an entity suffering such injury-in-fact is to be barred from review under a "prudential" rule like the one the Court of Appeals created.

[6] The Court of Appeals noted that at least one Treatment Council member receives non-hazardous used oil from heavy manufacturing industries for processing and resale as boiler fuel. Because these firms would have to spend more to process adulterated or contaminated oils, "more stringent EPA regulation would tend to protect it from this sort of injury." The Court of Appeals termed these "consumer claims" and held that this direct handling of an item subject to regulation conferred standing on the organization to present certain claims. App. 7a.

Addressing these "competitor claims," the Court of Appeals panel found "that tightening of environmental standards will generally foster not only a cleaner environment but also the member companies' profits, as it will expand the market for their services." App. 9a. But deeming this an "incidental benefit," the Court of Appeals held that this Court's decision in *Clarke v. Securities Industry Ass'n*, 479 U.S. 388 (1987), left the "status" of this type of commercial injury "somewhat unclear." App. 10a.

Citing the "zone of interests" test, the Court of Appeals acknowledged this Court's statement that the "test is not meant to be especially demanding" and that "in particular, there need be no indication of congressional purpose to benefit the would-be plaintiff." App. 10a, *quoting Clarke*, 479 U.S. at 399-400. But noting that the test "denies a right of review if the plaintiff's interests are so marginally related to or inconsistent with the purposes implicit in the statute that it cannot reasonably be assumed that Congress intended to permit the suit," (App. 10a, *quoting Clarke*, 479 U.S. at 399), the Court of Appeals found the need to create a new test for "prudential standing." Under this test, a plaintiff like the Treatment Council must show *either* a plainly expressed congressional intent to benefit him *or* that he would be an "unusually suitable champion" of Congress' goals. App. 10a-11a.

Here, the panel found it decisive that there was no specific showing of intent "to benefit recycling and disposal firms." App. 11a. The fact that these firms provide the technology indispensable to achieving Congress' goal, and their business existence depends upon the effectiveness of the agency's regulatory activity, did not confer "prudential standing" because: "in the absence of either some *explicit* evidence of an intent to benefit such firms, or some reason to believe that such firms would be unusually suitable champions of Congress's ultimate

goals, no one would suppose them to have standing to attack regulatory laxity." App. 11a (emphasis added). The Court of Appeals found itself unable "to picture such firms as suitable challengers of the agency," (App. 12a), where the claim was that the agency was not implementing the law with sufficient diligence.[7]

Nos. 87-1487, 87-1548, and 88-1177

These three cases were addressed in a single decision and judgment by the Court of Appeals. In Nos. 87-1487 and 87-1548, the Treatment Council and an individual company, Petro-Chem Processing, Inc. (not a member of the Treatment Council), sought review of an EPA regulatory extension which enlarged by more than three years the deadline for "big city" cement kilns to apply for "interim status," which would allow such kilns to burn liquid hazardous waste without a permit. This extension adversely affected Treatment Council members because it allowed competitor facilities to burn hazardous waste derived fuels under standards which are substantially more lenient than the standards which apply to

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[7] The court below noted that "many cases allow[] standing to firms whose sole concern is exposure to unwanted competition" and cited several cases of this Court, including *Clarke* itself. App. 12a. The court below also noted the cases of this Court which did not require any showing of express intent by Congress to confer competitive benefits on the plaintiff, although standing was allowed. To explain those cases, the Court of Appeals reasoned that this Court must have assumed, "without evidence, that entry-restricting legislation is intended to shelter competitors" but that legislators are reluctant to articulate that goal; therefore, in those cases, this Court's unarticulated assumptions about the unspoken legislative goal sufficed to confer standing. App. 13a. The Court of Appeals declined to apply that reasoning here, however, finding that to allow the pecuniary beneficiaries of a regulatory program to seek stricter enforcement of the regulatory program "would eliminate the prudential standing requirement." App. 14a. The Court of Appeals, therefore, dismissed the Treatment Council's "competitor claims."

fully permitted facilities, making that method of disposing of wastes competitively more advantageous.

In No. 88-1177, the Treatment Council sought review of EPA regulations which authorized the disposal of hazardous waste in salt domes, salt bed formations, underground mines and caves. Specifically, the Treatment Council contended that these regulations were directly contrary to RCRA's flat prohibition on the "placement" of hazardous wastes in these geologic formations without a permit. *See* 42 U.S.C. § 6924(b)(2). Treatment Council members were adversely affected by this rule because the use of unprotective land disposal methods (such as salt domes) avoided the need for Treatment Council members' services and frustrated the investment of Treatment Council members in their high technology solutions to the hazardous waste disposal problem—solutions that Congress had expressly sought to encourage by barring land disposal. *See* pp. 4-6 *supra*.

Considering itself bound by the decision of the panel in No. 86-1143, the panel in these cases held that "the prudential requirements for standing under RCRA" were not met by the commercial injury that Treatment Council members would suffer on account of the agency's failure to implement the statutory directive. Review was barred "[i]n the absence of any suggestion either of congressional intent to improve the competitive position of high tech recyclers, or of any reason to picture such firms as suitable challengers of the agency." App. 34a.

REASONS FOR GRANTING THE WRIT

I. THE DECISION BELOW CREATES A SIGNIFICANT BARRIER TO REVIEW OF AGENCY ACTION, DIRECTLY CONTRARY TO THE STANDARDS SET FORTH BY THIS COURT IN *CLARKE*.

In *Clarke v. Securities Industry Association*, 479 U.S. 388, 399 (1987), this Court held that the APA sets forth a "presumption in favor of judicial review of agency

action." In light "of Congress' evident intent to make agency action presumptively reviewable," when a particular plaintiff (suffering injury-in-fact) seeks to challenge an agency's implementation of a statute, there *"need be no indication of congressional purpose to benefit the would-be plaintiff."* *Id.* at 399-400 (emphasis added). Expressly disapproving a prior line of cases from the District of Columbia Circuit setting forth substantial "prudential barriers" to review of administrative action,[8] this Court held that the APA's "generous review provisions" should be construed "not grudgingly but as serving a broadly remedial purpose . . . ." *Id.* at 395 (citations omitted). More particularly, the Court held that so long as Congress has not manifested an intention to preclude review, the APA's standing requirements are satisfied if the plaintiff's interests bear a "plausible relationship to the policies underlying" the relevant statute.[9] *Id.* at 403.

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[8] Specifically, the Court in *Clarke* expressly rejected the "intent to benefit" requirement which had been applied by the D.C. Circuit in *Control Data Corp. v. Baldrige*, 655 F.2d 283 (D.C. Cir.), *cert. denied*, 454 U.S. 881 (1981), and which that court has resurrected in these cases. *See Clarke*, 479 U.S. at 400 n.15.

[9] Absent a direct indication of congressional intent to bar suit, the presumption of review may only be rebutted in the following circumstances:

> In cases where the plaintiff is not itself the subject of the contested regulatory action, the test denies a right of review if the plaintiff's interests are so marginally related to or inconsistent with the purposes implicit in the statute that it cannot reasonably be assumed that Congress intended to permit the suit. The test is not meant to be especially demanding; in particular there need be no indication of congressional purpose to benefit the would-be plaintiff.

Clarke, 479 U.S. at 399-400. The "so marginally related to or inconsistent with the purposes implicit in the statute" standard is encapsulated in the phrase "plausible relationship to the policies underlying" the relevant statute.

A. The Court of Appeals Has Transformed the Rule that there Need Be No Evidence of Intent to Benefit, and Petitioner Must Show Only An Interest Having A Plausible Relationship to Statutory Policies, Into a Requirement that there be "Explicit Evidence of Congressional Intent to Benefit" or a Showing that Petitioner Is an "Unusually Suitable Champion."

The opinions of the court below turn both the language and the premises of *Clarke* on their head, restoring the barriers to review of agency action that this Court expressly disapproved. Finding *Clarke* "somewhat unclear," the court below declared that a firm or group of firms seeking review of an agency failure to implement the law must shoulder the burden of demonstrating "some *explicit* evidence of [congressional] intent to benefit" them competitively, or that there is "some reason to believe that such firms would be unusually suitable champions of Congress's ultimate goals." App. 11a (emphasis added). This is precisely what this Court rejected in *Clarke*. Instead of presuming that a business that will concededly suffer financial injury from unlawful agency action has standing to challenge that action unless his interests bear no plausible relationship to the purposes of the statute, as *Clarke* expressly held (479 U.S. at 403), the Court of Appeals has transformed those standards for businesses suffering market injury as a consequence of agency failures to enforce the law. The rule that there need be *no* express intent to benefit but that the petitioner's interests must bear a plausible relationship to the statutory policies, has become a requirement for a showing of some *express* intent to benefit the petitioner, or reason to believe that petitioner is an "unusually suitable champion."

In contrast, other courts of appeals have had little difficulty applying *Clarke* directly to the same kinds of

claims as were at issue here.[10] They have found no need for new "tests" to supplant the "plausible relationship" standard set forth in *Clarke* itself. Without the creation of such a new, review-limiting "test," other courts have reached results directly contrary to those reached by the court below in this case. *E.g., DeLoss v. Department of Housing & Urban Development*, 822 F.2d 1460 (8th Cir. 1987); *Foremost Sales Promotions, Inc. v. Director, Bureau of Alcohol, Tobacco & Firearms*, 860 F.2d 229 (7th Cir. 1988); *City of Milwaukee v. Block*, 823 F.2d 1158 (7th Cir. 1987). The effect of reversing the presumption and revising the standard as the court below did here is determinative—particularly where full enforcement of the environmental laws, or other health and safety statutes, is at issue. Congress' primary articulated goal under such laws is invariably to protect the health and safety of many citizens. Switching the presumption requires the court to disregard the fact that as a means of achieving that ultimate goal it may be necessary to promote the development of certain industries along the way. As shown below, that is precisely the case here.

Apart from the mischief done to this Court's decision in *Clarke*, and to Congress' intent to assure agency compliance with its statutory mandate through private review actions, the "unusually suitable champion" test embarks the courts upon a highly subjective inquiry. That inquiry is not guided (as *Clarke* requires, 479 U.S. at 401) by analysis of the *overall* statutory context:

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[10] The decision of the United States Court of Appeals for the District of Columbia Circuit has *decisive* importance for the effective implementation of the environmental laws because that court has *exclusive* jurisdiction over the administrative implementation of many federal environmental statutes, including RCRA. *See, e.g.*, RCRA § 7006(a)(1), 42 U.S.C. § 6976(a)(1); Clean Air Act, 42 U.S.C. § 7607(b)(1); Safe Drinking Water Act, 42 U.S.C. § 300j-7(a)(1); Comprehensive Environmental Response, Compensation and Liability Act ("Superfund"), 42 U.S.C. § 9613(a); Surface Mining Control and Reclamation Act of 1977, 30 U.S.C. § 1276(a).

In these cases, for example, the Treatment Council provides the technology, equipment and treatment capacity that Congress sought to develop and encourage with RCRA.[11] The Treatment Council and its members are in the very business of accomplishing what Congress sought to accomplish in that statute. The special expertise of the Treatment Council, born of the market, is precisely the kind of expertise Congress would expect an agency to rely upon in promulgating regulations.[12] Nonetheless, under its test, the Court of Appeals' concluded, *ipse dixit*, that there was "no reason to picture such firms as suitable challengers" of the agency's failure to implement regulations that would allow Congress' environmental goals to be achieved.

Because the court below was focusing upon the presence or absence of "some *explicit* evidence of an intent to benefit" these firms (App. 11a), rather than a "plausible relationship" between their interests and the statute's objectives, it never considered the statute's "overall context," as *Clarke* expressly requires. Had the court applied the standards of *Clarke*, it would have been clear

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[11] *See* 42 U.S.C. § 6902(a)(6) (RCRA's goals include "encouraging process substitution, materials, recovery, properly conducted recycling, reuse and treatment").

[12] The kinds of pecuniary interests that the Court of Appeals here demeaned are precisely the kinds of interests that the Framers understood would inspire participation in the legislative process. Through substantive administrative rulemaking, Congress has shifted the arena in which these arguments are sifted, from the legislature itself to administrative agencies—with a right of judicial review. But in changing the forum in which these matters are resolved, there is no indication that Congress sought to restrict the people who might be allowed to participate in, and influence with their arguments, the process of making "quasi-legislative" rules. On the contrary, there is every reason to believe that Congress expected the right of participation in the rulemaking process to be as broad as it would be in the legislative process. Judicial review is necessary to ensure that the participation of a party in the administrative process is taken seriously. *See* Part II *infra*.

that encouraging the development of high technology treatment capacity bore a close relationship to Congress' plan for protecting the environment. RCRA's legislative history is replete with evidence that Congress intended

> to "provide a meaningful regulatory program to increase the treatment of hazardous waste *and the development of new treatment capacity*;" [13]
>
> to ensure "*that advanced treatment, recycling, incineration and other hazardous waste control technologies should replace land disposal*;" [14]
>
> "*to force the full development of alternative waste management technologies currently in existence*, but which are vastly under utilized;" [15]
>
> and to "*provide incentives for* [*the*] *development of treatment and disposal practices* that minimize threats from those hazardous wastes that continue to be produced." [16]

In fact, Congress sought to ensure that EPA's regulations would be enforced consistently and evenhandedly so that firms could rely on that enforcement in making investments in new technology and treatment capacity without fear that lax agency implementation would destroy that investment. EPA was expected to put in place "consistent regulatory and economic incentives" to encourage "immediate investment in [the] development of alternative capacity." S. Rep. No. 284, 98th Cong., 1st Sess. 19 (1983).

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[13] H.R. Rep. No. 198, 98th Cong., 1st Sess. 39 (1984), *reprinted in* 1984 U.S. Code Cong. & Admin. News 5576, 5598 (emphasis added).

[14] H.R. Rep. No. 1133, 98th Cong., 2nd Sess. 80 *reprinted in* 1984 U.S. Code Cong. & Admin. News 5649, 5651 (emphasis added).

[15] 129 Cong. Rec. H6505 (daily ed. Aug. 4, 1983) (Statement of Rep. Breaux) (emphasis added).

[16] 130 Cong. Rec. S9147-48 (daily ed. July 25, 1984) (Statement of Sen. Stafford, Chairman of the Senate Committee on Environment and Public Works) (emphasis added).

Not surprisingly, Congress was aware that the market could be mobilized to achieve RCRA's aims and sought to employ the market to develop the technology and treatment capacity to ensure a safer environment. Business was not outside the process, but part of it. Congress knew that it could not rely on then-existing market incentives to create a "new market and increased demand for new, safer treatment and disposal technologies" if RCRA's objectives were to be achieved.[17] Recognizing that "[i]ndividual entrepreneurs and small businesses are frequently the source of new technologies and new ideas that can become tomorrow's innovative approaches to hazardous waste treatment," [18] Congress intended the 1984 RCRA amendments to stimulate investment in these new technologies by providing assurance that strict regulations would ensure that the new technology would be used.[19]

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[17] 130 Cong. Rec. S13818 (daily ed. Oct. 5, 1984). *See* note 3 *supra*.

[18] 129 Cong. Rec. H8159 (daily ed. Oct. 6, 1983) (Statement of Rep. Skelton).

[19] Congress specifically regarded the type of advanced treatment technology offered by Treatment Council member companies as a model for what it envisioned for the industry:

> Alternatives to land disposal exist. I know, because in York, PA, in my district, Envirite Corp. [a Treatment Council member] operates a state-of-the-art facility that treats hazardous metal finishing wastes and certain other wastes that are principally contaminated by inorganic constituents. Envirite's treatment technologies and management methods convert toxic and hazardous wastes to nonhazardous wastes prior to their ultimate disposal. *This kind of treatment process should serve as a model to EPA in implementing the land disposal restrictions of H.R. 2867.*

129 Cong. Rec. H8896-97 (daily ed. Oct. 31, 1983) (Statement of Rep. Goodling) (emphasis added).

Thus, far from being "inconsistent" with, or "marginally related" to the underlying statute,[20] one of Congress' clear purposes in enacting RCRA—though obviously not the ultimate purpose—was to foster the development of waste management technology and an industrial base with sufficient capacity to meet the Nation's needs. The means of spurring the development of that capacity was the assurance of strict and evenhanded enforcement—precisely what the Treatment Council was attempting to insist upon in these review actions. By switching the burden to require an *express* showing of intent to benefit, or an "unusually suitable champion"—rather than merely a "plausible relationship to the purposes of the statute," as *Clarke* requires—the court below focused only on Congress' ultimate goals to the exclusion of the elements necessary to make the scheme work. Thus, in this case, the Court of Appeals' review-limiting test caused it to look for the forest—and to miss all of the trees.

B. The Marketplace Injury that the Court of Appeals Found to be a Questionable Basis for Review of an Agency's Failure to Implement the Law Provides a Sound Basis Upon Which to Premise Review of Unlawful Agency Action.

In establishing its new rule, the Court of Appeals was plainly influenced by the "apparent anomaly" of an entity claiming *financial* injury as the predicate for advocating lofty "pro-environment" positions. This reaction rests on

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[20] It is telling that, in these cases, EPA did not challenge the Treatment Council's standing to bring these actions until invited to do so by the Court of Appeals in the first of them, 86-1143. In fact, in other recent contexts, EPA has openly acknowledged the consistency between the Treatment Council's goals and those of RCRA. *See* 52 Fed. Reg. 43,906 (1987) ("The purpose of the Treatment Council and the objectives of RCRA [are] to promote health and environmental protection by minimizing land disposal of hazardous wastes and by encouraging the recycling, reuse and treatment of such wastes.")

a fundamental misperception of the significance with which the law regards marketplace injury for purposes of determining "prudential" standing.

The Treatment Council's basis for seeking judicial review to ensure that its views are taken seriously in the administrative process follows conventional lines. With respect to certain of the regulations cited as too lax, "the market for the services of these members of the Council will be smaller than it would have been if the EPA had adopted the Council's views." App. 6a. With respect to others, "the EPA ruling tends to enable . . . competitors to undersell" Treatment Council members because they are allowed by EPA to avoid the stringent treatment that Congress intended. App. 7a. A law requiring stringent waste management induces firms to invest in new facilities and develop new technologies—a classic economic interest that is frustrated when the agency fails to implement the law through regulations consistent with Congress' intent.

1. As the Court of Appeals itself recognized, standing based on injuries of this type mirrors a long line of cases "allowing standing to firms whose sole concern is exposure to unwanted competition." App. 12a, *citing Clarke*, 479 U.S. at 403; *Investment Co. Inst. v. Camp*, 401 U.S. 617 (1971); *Association of Data Processing Serv. Org., Inc. v. Camp*, 397 U.S. 150 (1970). *See also Sierra Club v. Morton*, 405 U.S. 727, 733 (1972). Following *Clarke*, appellate decisions from other circuit courts have uniformly held that such competitive injury is sufficient so long as there is a plausible relationship between those interests and some statutory objective, whether incidental or intermediate. *See DeLoss v. Dept. of Housing & Urban Development*, 822 F.2d 1460, 1463-66 (8th Cir. 1987); *Foremost Sales Promotions, Inc. v. Director, Bureau of Alcohol, Tobacco & Firearms*, 860 F.2d 229, 233-34 (7th Cir. 1988).

The Court of Appeals acknowledged that the decisions of this Court in which persons competitively injured are allowed to advance statutory interests that coincide with their interests "have not rested on any showing of explicit intent to shelter plaintiffs or their like from the hazards of competition." App. 13a.[21] Put simply, under the Court of Appeals' test, the cases of this Court were wrongly decided. That court was thus left to explain decisions by this Court that were rendered anomalous under the standard it was announcing. The Court of Appeals, therefore, hypothesized that the reason this Court has not required evidence of an express congressional purpose to protect petitioner companies from competition was because this Court must have believed that Congress would have been "reluctant to articulate" such a protectionist goal, even if it was really an important influence on Congress' decision to enact the legislation. App. 13a. In the Court of Appeals' view, this Court found standing in these cases on the basis of a presumed (but unmentionable) congressional intention to benefit private commercial interests. *Id.*

In fact, this Court has never dealt with the issue of competitor standing in the terms that the Court of Appeals hypothesized. The explanation for traditional competitor standing, including standing based upon loss of a

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[21] For example, the Court of Appeals noted that "exposure to unwanted competition" was the basis for standing in *Investment Company Institute v. Camp*, 401 U.S. 617 (1971), which involved a challenge to the Glass-Steagall Act. Nothing in the legislative history of the Glass-Steagall Act suggested that it was intended as a piece of competitive protectionist legislation—*i.e.*, to protect investment companies from competition from banks. On the contrary, as this Court described in *Clarke*, the purpose of that Act was to prevent the "possible loss of public confidence in banks and . . . speculation fueled by bank loans for investment purposes." App. 13a, *quoting Clarke*. Nonetheless, this Court had no difficulty finding that investment companies, fearing bank competition, had standing to argue that the regulatory program should have been strictly enforced.

market, rests on a simple premise. Congress is fully aware of the workings of the market and the role that market incentives may play in accomplishing its legislative objectives. Those "whose [market] interests are directly affected by a broad or narrow interpretation of the Act are easily identifiable." *Clarke*, 479 U.S. at 399 n.14, *quoting Data Processing*, 397 U.S. at 157. Congress is generally not blind to those interests.

From Congress' perspective, firms with a direct commercial interest in the implementation of laws imposing statutory requirements upon competitors ought to have standing to participate in the administrative process, and to obtain review to ensure that Congress' statutory intentions are vindicated, for the same reason that they make good participants in the legislative process. The financial interests of those firms create a strong reason for them to advocate forcefully positions of law and fact that might have an influence on the decisionmakers.[22] The fact that there is a pecuniary interest underlying such arguments may cause them to be discounted—but financial interest alone has never been thought to preclude a party from asserting a position. Therefore, while market beneficiaries of a statute may not have been intended as the *primary* beneficiaries of regulatory programs, so long as their financial interest is an expectable and direct consequence of the statute Congress enacts, one can reasonably assume (and *ought* to assume under *Clarke*) that Congress was aware of that impact. Where, as here, the legislative history shows that the commercial interest being asserted was a necessary step toward achieving Congress' ultimate objective (by causing the development of new technology and capacity), there is no basis to apply a test reflecting hostility to that marketplace injury.

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[22] To be sure, those arguments will rarely be phrased in the anti-competitive form: "restrict other firms in order to benefit my narrow competitive interest," but rather in the form "this is good for the Nation and we stand ready to fill the need."

2. The Court of Appeals also had to overcome a second line of cases of this Court involving another form of marketplace injury. *See* App. 15a. Those cases find "prudential standing for those who sell to regulated parties and complain that a regulatory *restriction* will curtail its oppportunities to sell to those parties." *Id.* (emphasis in original). *See United States v. Storer Broadcasting Co.*, 351 U.S. 192, 199-200 (1956); *Columbia Broadcasting Sys., Inc. v. United States*, 316 U.S. 407, 422-23 (1942); *Joint Anti-Fascist Refugee Comm. v. McGrath*, 341 U.S. 123 (1951). In this case, the regulatory actions of the agency seriously curtailed the opportunity of the Treatment Council's members to market their waste treatment services and products.

The Court of Appeals explained these cases in terms of the "non-statutory rights of such parties to deal freely with the regulated firms," embracing the " 'freedom to interact with a third person.' " App. 15a (citations omitted). The Court of Appeals found that the Treatment Council

> plainly lacks any such non-statutory interests. A firm has no common law interest . . . in having the government drive business its way or in having government force competitors' services to be of the same quality (and cost!) as its own.

App. 16a. It is not at all clear, however, why there is any greater common law interest in a "freedom to interact with a third person," than there is in the loss of one's investment, made in reliance on a statute designed to encourage that investment, but which an administrative agency arbitrarily and capriciously fails to implement.

In any case, this Court has never referred to "freedom to interact with a third person" in finding standing. The approach of this Court has been both more practical and more sensible. Where a party's injury is suffered through

dealings with a third-party that is subject to regulation, the expectedness of that result, because it is direct and immediate, may leave little doubt that that party was arguably within the "zone of interests" affected by the statute. In this case, of course, the interest that is often implicit was explicit, for Congress was well aware of market forces and the need to encourage investment in the industry represented by the Treatment Council in order to achieve Congress' ultimate goal of protecting the environment. Congress may properly rely upon such firms to "challenge agency disregard of the law." *See Block v. Community Nutrition Inst.*, 467 U.S. 340, 351 (1984).

II. THIS CASE RAISES IMPORTANT ISSUES ABOUT THE USE OF PRUDENTIAL RULES TO BAR REVIEW OF ADMINISTRATIVE FAILURES TO IMPLEMENT STATUTORY DIRECTIVES.

The fundamental premise of this Court's decision in *Clarke* was that whatever concerns might prompt a restrictive view of standing in other contexts, the generous remedial provisions of the APA leave little room for the Judicial Branch to create obstructions to review of agency action. *See Clarke*, 497 U.S. at 394-95, 400 n.16. Congress' broad intentions are a reflection of the special purpose that APA review fulfills as a means of assuring the Executive Branch's adherence to Congress' instructions.[23]

A. For 150 years, laws were made almost exclusively through the legislative process, the process contemplated by the Constitution and well-understood by the Framers.

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[23] Thus, while one might be reluctant to hold, in statutory rights cases, that Congress intended to confer the right to bring lawsuits on persons beyond those whom Congress primarily sought to benefit by enactment of a statute, a different presumption applies where review of agency action is at stake. *See Clarke*, 479 U.S. at 400 n.16.

In that open process, the views of an organization like the Hazardous Waste Treatment Council would be welcome. The Treatment Council's financial interest in the outcome of any dispute involving the environmental laws would ensure its advocacy; that advocacy would be especially useful because it would bring expertise born of the marketplace to describe the technical and practical solutions to the problems that Congress perceived.

1. With the advent of administrative agencies and "quasi-legislative" rulemaking, Congress has changed the process for making many of the policy and practical decisions involved in lawmaking as historically understood. As part of the *quid pro quo* for that change of lawmaking venue, Congress has established a procedure, which includes not only a citizen's right to participate in the administrative process, but also a right of judicial review for all those "adversely affected" by the agency's actions. 5 U.S.C. § 702. This element of review was plainly designed by Congress to ensure that the agency's actions, under color of statutory authority, were not in fact inconsistent with Congress' will. And in substituting an administrative process for the legislative process, Congress nowhere expressed any intention to *restrict* the participants in the process. Thus, this Court has repeatedly referred to the "generous review provisions" of the APA and has cautioned that its review provisions "should be construed 'not grudgingly but as serving a broadly remedial purpose.'" *Clarke*, 497 U.S. at 395 (citations omitted). For precisely the same reasons that business groups like the Treatment Council are important participants in the legislative process, they are vital participants in the administrative process as well.

2. In a given case, Congress' intent to preclude review may be inferred from the statutory scheme considered as a whole—for example, "when a statute provides a detailed mechanism for judicial consideration of particular issues at the behest of particular persons, judicial

review of those issues at the behest of other persons may be found to be impliedly precluded." *Community Nutrition Inst.*, 467 U.S. at 349. But it is apparent that the basic presumption must go the other way: Consistent with Congress' intent, and with the important purpose served by review of administrative rulemaking, the courts ought to hear challenges to administrative rules by those suffering injury from those rules, *unless* there is some persuasive reason not to. *See City of Milwaukee v. Block*, 823 F.2d 1158, 1166 (7th Cir. 1987) ("Under *Clarke*, we begin with the presumption that parties who meet the requirements of Article III have standing to contest actions by federal administrative agencies").

The restrictive approach of the court below frustrates the implementation of any statutory scheme to which it might be applied. If the position denied a hearing is, in fact, meritorious, then, by definition, the agency has been allowed to flout Congress' intentions. And because the administrative process is an extension of the legislative process, any curtailment of standing tends to distort the process of policymaking that the Framers contemplated, wherein diverse interests would vie against each other through argument and debate.

3. Effective participation in the *administrative* process by groups like the Treatment Council hinges not only on the quality of their arguments, but on their ability to obtain judicial review if their well-founded arguments are ignored. It denies reality to believe that the Treatment Council can remain a viable participant in the administrative process once the courts have held that administrative agencies are free to ignore its advice. But the arguments and expertise provided by groups like the Treatment Council—which, because they are in the business of treating hazardous wastes, have knowledge vital to fulfilling the goals that Congress set for the agency—are precisely the arguments and expertise that the agency needs in order to perform its statutory mission success-

fully. The courts should be reluctant to exclude from judicial review of agency action persons whose vigorous participation in the administrative process is plainly essential.

B. The test announced by the Court of Appeals in this case tends to involve the courts in subjective judgments about who should be allowed to argue what in the courts.

1. Of course, the first prong of the test—whether Congress expressly intended to benefit the would-be plaintiff—is similar to the kinds of inquiries that courts ordinarily make. But as applied by the Court of Appeals in this context, it leads to absurdly restrictive results—as this Court's rejection of the "express benefit" test in *Clarke* recognized. As explained above, the Treatment Council and its members, because of the business they are in—environmental protection—necessarily benefit when Congress passes laws better to protect the environment. Indeed, Congress has quite consciously promoted the development of such an industry as a necessary step to the accomplishment of its environmental goals. Yet, in this case, the Court of Appeals found the *express* intended beneficiaries of the lofty environmental laws to be only "consumers," notwithstanding statutory language and legislative history demonstrating that the waste treatment industry was also to be enhanced and expanded to achieve the legislative goals. At the same time, the Court of Appeals recognized that even on silent legislative records, in regard to other statutes, this Court has had little difficulty finding that parties suffering competitive injury would indeed have standing. The distinction is intuitive at best. It would appear far more reasonable to presume that an industry or group that would, in fact, directly and predictably benefit from the passage of a statute was at least *among* those that Congress sought to benefit.

2. The second prong of the test announced by the Court of Appeals—whether the parties seeking review

"would be unusually suitable champions of Congress's ultimate goals"—is entirely subjective. The court below found that the Treatment Council was *not* an "unusually suitable champion" of Congress' ultimate goals, despite the facts that (1) Congress relied on, and sought to encourage the expansion of the treatment industry in order to secure a safe environment; (2) Congress has historically relied upon firms suffering competitive injury to pursue challenges to administrative regulations; (3) the Treatment Council's interests in providing advanced forms of hazardous waste treatment, and added capacity, appear entirely congruent with the statutory objectives; and (4) the Treatment Council and its members have the incentive to advance their arguments informatively, and the special expertise vital to intelligent decisionmaking in the field. Under these circumstances, the court's determination that the Treatment Council did not meet its burden of showing that it was an "unusually suitable champion" demonstrates that this new test of standing will invariably turn more upon the predisposition of appellate panels than upon Congress' intent.

3. Apparent as well is the unseemly charade that this type of ruling produces. The inevitable effect of a ruling like this is to require an organization like the Treatment Council to modify the composition of its membership so that it can acquire "standing" to participate in the administrative and judicial processes that are essential to its economic survival. Predictably, injured organizations which find themselves excluded by ill-conceived prudential rules of standing will seek to bring within their membership, or ride the coattails of, persons whose interest in the outcome of particular disputes is more to the particular court's liking.[24]

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[24] Excessive vigilance in applying prudential rules to forestall review of agency laxity embroils the courts of appeals in procedures to which they are poorly suited. In both of these cases, the orders of the court below required the submission of hosts

Commenting upon the search for sufficiently suitable beneficiaries engendered by harsh "prudential" rules of standing, this same Court of Appeals in *Control Data Corp. v. Baldrige*, 655 F.2d 283 (D.C. Cir.), *cert. denied*, 454 U.S. 881 (1981), commented upon the process it was creating:

> We are not unmindful of the quality of fantasy or play in the search for beneficiaries. "Litigants search for a personality that will fit the demands of the court, tailor their attributes, paint their faces, manipulate their identities . . . ." We do not believe it is our place, however, to call a halt to this "masked ball."

655 F.2d at 297 n.28 (citation omitted).

With this Court's express disapproval of the rule established by the Court of Appeals in *Control Data*, this Court seemed to put an end to the "masked ball." *See Clarke*, 479 U.S. at 395. The decision below restores it.

C. The same financial interests that provide the incentive to participate in administrative and judicial proceedings also create the financial ability to participate effectively. The environmental organizations that the Court of Appeals apparently viewed as "suitable champions" of Congress' environmental objectives frequently lack the financial resources to pursue all matters of concern to them, no matter how important the issue is, or how far from the requirements of law the agency has strayed. Public interest groups frequently rely upon businesses with *commercial* interests coincident with their own to take the laboring oar in helping to assure that the environmental laws are properly and informatively en-

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of affidavits and counter-affidavits designed to illuminate with precision the way in which the Treatment Council and its members were affected by the agency's regulations, as well as their relationship to the overall objectives of the Act. The inappropriateness of such evidentiary exchanges in the courts of appeals (in pursuit of self-created prudential standards, rather than standards required by the Constitution or by Congress) should be apparent.

forced. Indeed, similar reliance and alliances have been formed throughout the Nation's history in an effort to influence public policy. Thus, an important means of ensuring agency compliance with environmental law has been cut off, to the detriment not only of the business organizations that will suffer financial injury, but to the detriment of the very consumer groups that even the court below recognized were intended to be benefited by these Acts.

III. THE REJECTION OF PETITIONER'S INTEREST AS A BASIS FOR OBTAINING JUDICIAL REVIEW CREATES A SIGNIFICANT OBSTACLE TO THE IMPLEMENTATION OF THE ENVIRONMENTAL LAWS AND UNNECESSARY CONFUSION IN THE LAW OF "STANDING."

As demonstrated above, the decision of the Court of Appeals in these cases is flatly inconsistent with the basic premises of this Court's recent cases. By purporting to find internal tensions in *Clarke* sufficient to warrant the creation of a special review-limiting test, the analysis of the court below creates obstacles to judicial review that a straightforward reading of *Clarke* precludes. Other circuits have had little difficulty applying *Clarke*'s "plausible relationship standard" in similar cases without any need to reverse the presumption or to require the petitioner to show he is an "unusually suitable champion" of Congress' goals. Applying *Clarke* directly, those courts have reached results directly at odds with the decision below. *See, e.g., DeLoss*, 822 F.2d at 1462-66; *Foremost*, 860 F.2d at 232-34; *Block*, 823 F.2d at 1164-67.

The obstacles to judicial review created by this decision—directed to situations where businesses are seeking *more* effective implementation of laws protecting the health and safety of citizens—are of vital importance to the overall scheme of enforcement of the environmental laws. This ruling—by the court possessing *exclusive* appellate jurisdiction over many of the major federal en-

vironmental statutes [25]—tends to shut out of the administrative process, as well as the judicial review process, the businesses that have the incentive and the financial ability to pursue environmental objectives, and the special expertise to contribute meaningfully to the debate. As such, the decision will have (and is already having) a profound effect on the citizenry's ability to ensure administrative vigor, adherence to the congressional plan, and informed decisionmaking in the implementation of the environmental laws.

Here, Congress recognized that the development of industrial capacity and effective technology to treat hazardous wastes was necessary to achieve its ultimate aims. The Court of Appeals' determination that these interests are unworthy of protection in the courts, and its refusal even to hear the arguments of firms asserting such interests, denigrates and frustrates Congress' substantive aims under the guise of a standing determination. In a case like this, where the interest being asserted is important to achieving Congress' ultimate objectives, the denial of standing means that one of *Congress'* own interests are to be denied a voice in the administrative process.

Beyond its effect on environmental enforcement, however, the decision below has added unnecessary confusion to an area of the law that deserves some certainty—and appeared to achieve it with *Clarke*. To be sure, as the concurring opinions in *Clarke* pointed out, the *result* in *Clarke* might have been explained by a narrower holding—*e.g.*, that Congress specifically intended to foster the competitive interests of the would-be plaintiff in that case. *See Clarke*, 479 U.S. at 409-417 (concurring opinions). But if *Clarke*'s clear explanation of the rule is now to be dismissed as dictum, then that is something that this Court should declare. On the other hand, if *Clarke*'s description of the analysis to be applied is to

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[25] *See* note 10 *supra*.

be taken seriously, then it is important that it be applied to cases like this.[26]

The recurring fact pattern of this case—involving commercial injury when the underlying statute is ultimately intended to foster some loftier goal—makes this case especially appropriate for resolving any ambiguity left by *Clarke*. But if *Clarke*'s careful explanation of the standards for obtaining review of administrative decisions is now to be dismissed as ambiguous, then businesses whose immediate interests are at stake in agency proceedings, but who would be denied review under the rule announced below, should be told. Such businesses and business groups will have to restructure themselves (to attend the "masked ball") so that they will be allowed to present the arguments that they must present if they are to survive in the face of agency failures to implement the laws on which they depend for their livelihood.

CONCLUSION

The petition for certiorari should be granted.

Respectfully submitted,

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[26] As this Court itself observed in *Clarke*, the Court's standing jurisprudence under the Administrative Procedure Act has not always been "self-explanatory." *Clarke*, 479 U.S. at 396. Despite the deliberate effort in *Clarke* to clarify that jurisprudence, the premises and purposes of the "zone of interest" test apparently remain so obscure that it leads—in at least this court of appeals—to the creation of new, supplemental tests that take on jurisprudential lives of their own.